2008

Bruce Hills and Judith Hills, Mard D. Hills v. United Parcel Service Inc., UPSCO United Parcel Service Co., Liberty Mutual Holding Company Inc., Liberty Mutual Fire Insurance Company, Skyline Electric Company : Reply Brief

Utah Court of Appeals

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IN THE SUPREME COURT
STATE OF UTAH

APPELATE CASE
NO. 20080826

BRUCE HILLS AND JUDITH HILLS
Individually, and as natural parents and heirs of MARK D. HILLS,

Plaintiff/Appellants,

vs.

UNITED PARCEL SERVICE., INC., an Ohio Corporation; UPSCO UNITED PARCEL SERVICE CO., a Delaware Corporation; UNITED PARCEL SERVICE INC., a Utah Corporation; LIBERTY MUTUAL HOLDING COMPANY, INC., a Massachusetts Mutual Holding Company; LIBERTY MUTUAL FIRE INSURANCE COMPANY, a Massachusetts Mutual Holding Company; and SKYLINE ELECTRIC COMPANY, a Utah Corporation,

Defendant/Appellees.

REPLY BRIEF OF APPELLANTS

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH,
HONORABLE TERRY L. CHRISTIANSEN

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I. ARGUMENT

A. UTAH SHOULD RECOGNIZE SPOLIATION.

Defendant/Appellees, United Parcel Service and Liberty Mutual, argue that Utah should not adopt spoliation as an independent cause of action. Defendants primarily rely upon the assertion that evidentiary inferences, sanctions for misconduct, or criminal penalties – or in the instant case administrative code, specifically the Utah OSH Act, work as effective deterrents against evidence tampering or destruction. *See* Defendant UPS Br. 12, 21-23; Defendant Liberty Mutual Br. at 17-18. But, the reality is, none of these mechanisms were effective at stopping Defendants from spoiling evidence and Plaintiffs were consequently damaged.

Courts adopting spoliation have reasoned that general principles of law necessitate recognition. "The concept of American justice...pronounces that for every wrong there is a remedy. It is incompatible with this concept to deprive a wrongfully injured party of a remedy," *Hannah v. Heeter*, 584 S.E.2d 560, 566 (W.Va.,2003), and "New torts are recognized when an interest requiring protection from unreasonable interference is identified. The common thread woven into all torts is the idea of unreasonable interference with the interests of others." *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 848 (D.C.,1998)(internal citations omitted).

Specific to the wrong inherent in evidence destruction, Montana has reasoned, "[t]he intentional or negligent destruction or spoliation of evidence cannot be condoned and threatens the very integrity of the judicial system." *Oliver v. Stimson Lumber Co.*, 993 P.2d 11, 17 (Mont.,1999). New Mexico concludes, "[w]e base our recognition of this tort on our belief that the intentional destruction of potential evidence in order to disrupt or defeat another person's right of recovery is highly improper and cannot be justified." *Coleman v. Eddy Potash*, 905 P.2d 185, 189 (NM.,1985).

Beyond these general and specific reasons to adopt spoliation, courts have identified that plaintiffs lack recourse for damages against third-party spoliators; therefore the tort of spoliation serves a critical legal function. "When evidence is in the possession of a third party, however, the various sanctions available to the trial judge are inapplicable and other considerations arise." *Oliver*, 993 P.2d at 17. West Virginia reasons similarly, "a third party spoliator is not subject to an adverse inference instruction or discovery sanctions. Thus, when a third party destroys evidence, the party who is injured by the spoliation does not have the benefit of existing remedies. Such a result conflicts with our policy of providing a remedy for every wrong and compensating victims of tortious conduct." *Hannah*, 560 S.E.2d at 568.

In the instant case, as originally pled by Plaintiffs, Defendants UPS and Liberty Mutual willfully and intentionally removed and altered evidence of Mark Hills' death, Compl. ¶¶ 50-51 (R. 12); engaged in such to prevent and hinder potential litigation against the appellees, Compl. ¶¶ 53-54 (R. 12); and Plaintiffs' legal cause of action was consequently damaged. Compl. ¶ 69(j-k) (R. 21-22).

UPS trivializes what happened as "in the interest of worker safety" and omits the chronological fact that the Utah Occupational and Safety Health Division of the Labor Commission (UOSH) had instructed UPS and Liberty Mutual to not alter the scene the morning of the accident (UPS Br. 5-6; R. at 915, ¶ 7) and furthermore UPS had already altered the scene before UOSH arrived, contrary to law (R. at 915, 917; ¶¶ 6, 15).[1] Yet, despite the potential UOSH sanctions and potential criminal charges pursuant to Utah Code Ann. § 76-8-510.5 and § 76-2-204, Defendants still engaged in destruction of evidence. The established deterrents failed to thwart Defendants malfeasant behavior.

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[1] Irrespective of these UOSH violations, as U.C.A. 34A-6-110 prohibits use of OSHA provisions to affect common law duties, Plaintiffs pled a general duty to preserve the scene and evidence as well as a general violation of applicable law. Compl. ¶¶ 62-65 (R.14); ¶¶ 73-78 (R. 16-17); and ¶¶ 86-91 (R. 19-20).

More importantly, though, Plaintiffs cannot seek recourse for their damages, as further discussed below, incurred as a consequence of the third-party Defendants' acts in the first-party lawsuit Plaintiffs filed against Skyline Electric Company. *See*, *Hills v. Skyline Electric Co.*, Civil No. 040107125, Third Judicial District Court (hereinafter "*Hills I*").(R. 613 – 718).

As an alternative to the proposition that current legal or administrative mechanisms are adequate to address spoliation, UPS argues the burden upon the employer would be too great to preserve evidence in the event of third-party litigation. UPS Br. 26. This contention lacks merit. Employers are already required by UOSH, pursuant to Utah Administrative Code R614-1-5.C.2, to preserve evidence relative to an accident scene until authorized by UOSH to remove or destroy such evidence. In light of this UPS's claim the independent tort of spoliation would further burden an employer than already required by administrative code is groundless. Preserved for the record and a potential civil suit, due to an employer's adherence to UOSH requirements and the ensuing UOSH accident investigation, would be evidence of the cause of the accident – unless, as in the instant case, the employer intentionally destroys such evidence.

Taking into account the lack of burden upon an employer; the need for legal recourse against a third-party spoliator; and the inadequacy of deterrents poised by Utah's administrative code or criminal sanctions, this Court should adopt spoliation as a legal remedy. Doing so is congruent with judicial axioms expressed in *Hannah* that for every wrong there is a remedy and *Holmes* that a party's interests should be protected from unreasonable interference. The destruction of evidence by a third-party without an available recourse for an injured first-party plaintiff runs contrary to justice. Such malfeasance if unaddressed, "threatens the very integrity of the judicial system."

B. PLAINTIFFS HAVE PLED THE ELEMENTS OF SPOLIATION.

UPS and Liberty Mutual contend Plaintiffs have failed to meet the elements of spoliation. UPS Br. 13-19; Liberty Mutual Br. 18-22. As argued in Plaintiffs brief, this Court should adopt the elements of spoliation set forth in *Smith v. Howard Johnson Co.,* 615 N.E.2d 1037 (Oh.,1993): "(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts." *Smith* 615 N.E.2d at 1038. These five elements, in particular the fifth

element, can be demonstrated by Plaintiffs as these Ohio factors do not require the inability to prove the underlying suit.

Under the *Smith* elements, as previously argued in Plaintiffs' Brief, (1) Mark Hills' wrongful death, made litigation involving Plaintiffs probable; (2) the gravity of the event and Defendants' related evasive behavior and onsite attendance by counsel, indicates knowledge of probable litigation; (3) the willful alteration and destruction of evidence by Defendants was designed to disrupt an investigation, and thereby impede Plaintiffs' probable suit; (4) these actions disrupted Plaintiffs' case by forcing litigation with the non-parties UPS and Liberty Mutual in *Hills I* to obtain destroyed and altered causation evidence; and (5) Defendants' actions proximately caused damage to Plaintiffs as further discussed below.

C. PLAINTIFFS HAVE BEEN DAMAGED.

UPS and Liberty Mutual argue Plaintiffs have not been damaged, as Skyline Electric has admitted liability in the underlying *Hills I* lawsuit. UPS Br. 15; Liberty Mutual Br. 18-19. To the contrary, though, Appellants have been damaged by incurring the additional expense of litigating with non-parties UPS to compel discovery in *Hills I* of the UOSH accident report [UPS restricted UOSH from releasing the report. (R. 825 – 827)]; and the expense and time of litigating with UPS to compel Heath Engineering's

reports and Heath Engineering personnel responsible for evidence alteration and destruction. (R. 913 – 927). These expenses increased the cost of litigating *Hills I* thereby reducing Plaintiffs net recovery and probable expectancy.[2] As originally pled in the Complaint, and pertinent to these expenses, Plaintiffs sustained damages from tortious interference with a legal cause of action and hindrance with a lawful cause of action. Compl. ¶ 69(j-k) (R. 21-22). Without UPS and Liberty Mutuals' alteration and destruction of evidence, the forgoing legal proceedings would have been unnecessary.

UPS counters that such damages cannot be assessed in a spoliation action, attacking Plaintiffs' citation to *Thompson v. Owensby,* 704 N.E.2d 134 (In.Ct.App., 1998). UPS Br. 18.[3] In *Thompson*, the Indiana Court of

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[2] The district court states that Plaintiffs' damages for wrongful death were fixed at the moment of Mark Hills' death, Dist. Ct. Op. at 5-6 n2 (R. 1228-29 n.2). UPS and Liberty Mutual rely upon this assessment in their briefs. UPS Br. 15-16; Liberty Mutual Br. 28. Although the elements that compose a wrongful death cause of action in Utah [loss of support; loss of assistance and service to the family; loss of society, companionship and happiness of associations, and loss of the possibility of inheritance, if decedent is an adult, *Allen v. U.S.*, 588 F.Supp. 247, 445 (1984)], would be fixed at time of death, and these damages constitute a property right for the heirs, *Switzer v. Reynolds*, 606 P.2d 244, 247(1980), the net recovery from these injuries can be reduced and altered by a defendant's spoliation acts.

[3] UPS improperly claims that *Thompson* has been rejected by the Indiana Supreme Court. To support this UPS makes an in incomprehensible cite to "*supra* at 21 n.3." UPS Br. 18. Instead, *Thompson* has been distinguished by the Indiana Supreme Court in *Glotzbach v. Froman*, 854 N.E.2d 337

Appeals noted, besides alleging damages resulting from inability to prove the underlying suit, alternatively an injured party can assert damages due to the cost of conducting additional discovery needed to provide alternative proof due to the destroyed evidence. *Thompson*, 704 N.E.2d at FN 7. Plaintiffs, during the discovery process in *Hills I*, as argued above, incurred additional legal costs in order to discern causation as a result of the spoliation conducted by Defendants.

UPS also relies upon the district court's reasoning that the damages Plaintiffs seek merely constitute delay, and as such do not qualify as compensable damages. UPS Br. 16-18. First, contrary to the district court's argument, motions to compel occurred in *Hills I*, as stated above. Second, these motions constituted additional discovery – the cost of which *Thompson* notes is an appropriate measure of damages, in the alternative to inability to prove an underlying first party suit.

D. WORKERS' COMPENSATION BAR IS INAPPLICABLE TO UPS

UPS incorrectly reasons that its acts of spoliation are barred by the exclusivity provision of Utah's Worker's Compensation Act. This argument dispels the applicability of the dual capacity doctrine; the willful and

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(Ind.2006) and *Gribben v. Wal-Mart Stores, Inc.*, 824 N.E.2d 349 (Ind. 2005).

intentional nature of UPS's spoliation; as well as the fact spoliation damages are considered outside the coverage formula of workers' compensation acts.

1) THE DUAL CAPACITY DOCTRINE APPLIES

The application of the dual capacity doctrine depends upon "whether the employer's conduct in the second role or capacity has generated obligations that are unrelated to those flowing from the company's ... first role as an employer." *Bingham v. Lagoon Corp.,* 707 P.2d 678, 680 (Utah 1985)(emphasis added). UPS cites the fact that Utah's OSH Act mandates employers to preserve post-accident evidence; therefore, UPS's obligation to preserve evidence stems from their role as Mark Hills' employer pursuant to Utah Admin. Code R614-1-5.C.2. UPS Br. 30-32. Irrespective of the UOSH code, though, Plaintiff's pled a general duty to preserve evidence [Compl. ¶¶ 62-65 (R.14); ¶¶ 75-78 (R. 16-17); ¶¶ 88-91 (R. 19-20)] and Plaintiffs' Brief does not rely upon UOSH codes to impart a duty to UPS to preserve evidence.

As argued (Pl. Br. 28-31), an obligation arose that was unrelated to UPS's role as Mark Hills' employer. Consistent with *Coca Cola Bottling Co. v. Superior Court*, 233 Cal. App.3d 1273, 286 Cal.Rptr. 855 (1991), UPS had a second capacity as an evidentiary caretaker which arose after the claimant's on the job related injury. *Coca Cola* at 1293, 867. Whether or

not this role relates to UPS's first role as Mark Hills' employer, given Utah precedent in *Bingham*, hinges upon what constitutes "flowing from." The Tenth Circuit Court of Appeals, which interpreted Utah's potential application of the dual capacity doctrine as set forth in *Bingham*, opined "flowing from" is analogous to "attributable to the accident resulting in injury which as a primary cause set in motion a train of events from which the aggravated condition resulted," *Worthen v. Kennecott Corporation*, 780 F.2d 856, 859 FN2 (10th Cir.,1985), citing *Gunnison Sugar Co. v. Industrial Commission,* 275 P. 777, 779 (1929). In the instant case, UPS's intentional destruction of evidence resulted in damages that were wholly unrelated to injury that caused the fatal electrocution of Mark Hills. The former are damages to probable expectancy which do not flow from the bodily electrocution of Mr. Hills. Instead, UPS committed a separate act that harmed a property right of Mr. Hills, whereas Skyline Electric's negligence caused the actual on-the-job injury.

In addition, while examining Utah's potential application of the dual capacity doctrine, the *Worthen* court also explained that Utah's OSH Act covers a "broad range of foreseeable events set in motion by the on-the-job injury." *Worthen*, 780 F.2d at 859 (emphasis added). Intentional destruction

of post-accident evidence by an employer does not constituent a foreseeable event as a result of Mark Hills employment.

2. PLAINTIFFS HAVE PLED INTENTIONAL HARMFUL ACTS BY DEFENDANT UPS

To buttress the argument that Utah's workers' compensation exclusivity bar applies, and the intentional acts preclusion is inapplicable, UPS asserts Plaintiffs have only pled Skyline Electric caused harm to decedent Mark Hills. Meanwhile, UPS claims Plaintiffs failed to plead intentional or harmful behavior by UPS. UPS Br. 33. UPS further alleges that Plaintiffs never alleged UPS spoiled evidence to cover up its own culpability. *Id.* These allegations suggest that UPS confuses the underlying negligence tort in *Hills I*, an electrocution death, with the separate tort of spoliation asserted in the present action.

To begin, Plaintiffs' complaint states, "defendants willfully and intentionally...removed and/or altered equipment, materials or other evidence pertaining to the cause of the electrocution." Compl. ¶ 35 (R. 8). Plaintiffs also alleged defendants performed such acts to "cover up the true facts and circumstances" of Mark Hills' death and "prevent Plaintiffs from bringing an action against defendants." Compl. ¶¶ 53-54 (R. 12). Finally, Plaintiffs pled damages resulting from this intentional interference and hindrance with their legal cause of action. Compl. ¶¶ 96 (j-k)(R. 21-22).

In addition to Plaintiffs having pled the assertions UPS claims were not made, the issue is not culpability of UPS for the fatal electrocution. The issue is whether UPS's post-accident evidence destruction and alteration harmed Plaintiffs. The *Hills I* lawsuit pertains to an electrocution tort which UPS has nothing to do with, whereas the instant action revolves around evidence destruction. Furthermore, the inquiry is not about motive and whether UPS was hiding its culpability. Motive is not a requisite element in the intentional acts exception to the workers' compensation exclusivity bar. "Rather than defining and determining intent, the "intent to injure" analysis focuses on whether the actor knew or expected that injury would occur as a consequence of his actions, thereby distinguishing between intentional and unintentional workplace injuries under the Act." *Helf v. Chevron U.S.A., Inc.*, 203 P.3d 962, 970 (Utah 2009). Thus, the inquiry is whether UPS knew or expected that the injury – the destruction and alteration of accident scene evidence – would result in damage to a potential lawsuit by Mark Hills' heirs against the liable party. Clearly altering or destroying evidence at an accident scene would impede and harm the ability to prove what caused the accident and who is at fault.

3. SPOLIATION DAMAGES ARE OUTSIDE WORKERS' COMPENSATION FORMULA.

UPS fails to address Plaintiffs' argument that spoliation damages are considered outside the "coverage formula" of workers' compensation exclusivity provisions. Pl. Br. 20-23; 25; *see also* Utah Code Ann. § 34A-2-105(1) (1999). This argument alone precludes the need to discuss the applicability of the dual capacity doctrine or whether Defendant UPS's behavior was willful and intentional. Spoliation damages preclusion from the workers' compensation formula also undermines UPS's claim that this Court must adopt two new theories, spoliation and the dual capacity doctrine, in order for Plaintiffs to prevail. UPS Br. 12.

UPS is wrong because: (1) Utah has recognized that non-physical and non-mental injuries are not within the exclusivity provision of workers' compensation, as stated in *Shattuck-Owen v. Snowbird Corp.*, 2000 UT 94, ¶ 19, 16 P.3d 555, and (2) jurisdictions acknowledging third-party employer-employee spoliation delineate the damage a non-bodily injury outside the scope of workers' compensation coverage. Consequently, UPS's acts should not be barred pursuant to Utah's Workers' Compensation Act.[4]

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[4] Jurisdictions holding spoliation damages as outside workers' compensation formula/exclusivity: Florida, *Lincoln Insurance Company v. Home Emergency Services, Inc.*, 812 So.2d 433, 436 (Fl. Ct. App.,2002); Louisiana, *Carter v. Exide Corporation*, 661 So.2d 698, 704 (La.App. 2

E. PLAINTIFFS HAVE PLED AND MET THE ELEMENTS OF INTENTIONAL INTERFERENCE

Liberty Mutual asserts that Plaintiffs have failed to meet the elements of the underlying and recognized Utah tort of intentional interference (Liberty Mutual Br. 26-30), a tort which serves as a foundation for courts that adopt spoliation. Liberty Mutual attacks Plaintiffs' theory based upon the second and third prong of the intentional interference test put forth in *Leigh Furniture and Carpet Co. v. Isomer*, 657 P.2d 293(Utah 1982). Respectively, these are: (2) the tortfeasor must act with an improper purpose and (3) consequently damage the plaintiff. *Leigh*, 657 P.2d at 304.

Liberty Mutual premises the lack of improper purpose upon the fact there was a legitimate reason to alter or destroy accident scene evidence, citing *St. Benedict's Dev. Co. v. St. Benedict's Hospital*, 811 P.2d 194 (Utah 1991). Specifically, Liberty Mutual states Defendants needed to determine the cause of the accident and prevent injury to others. Liberty Mutual Br. 29. But, the reality is Defendants, despite being told to seal and isolate the Mobile Distribution Unit (MDA), wherein the electrocution had occurred (the sealing and isolation of which would have been the safest precaution), instead reconnected the MDA to the distribution facility and had third-party

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Cir.,1995); Montana, *Oliver*, 993 P.2d 11 at 16-17; and New Mexico, *Coleman*, 905 P.2d at 192.

Heath Engineering alter accident evidence. (R. 915-916). Furthermore, prior to UOSH's arrival on the morning of the accident, Defendants had already altered or destroyed evidence pertaining to the accident instead of taking the sensible safety precaution of restricting people from the accident scene and preserving the scene's integrity. (R. 914-916).

In contrast, in *St. Benedict's Hospital*, upon which Liberty Mutual relies, the defendant hospital's damaging acts were deemed "an inevitable byproduct of competition." The defendant hospital had merely solicited tenants for a new office building – tenants who might have remained tenants of the plaintiffs. The court held such conduct by the hospital, engaged in during the regular course of business, did not qualify as improper, *supra* at 201, citing *Leigh Furniture,* 657 P.2d at 307. Dissimilarly, in the instant case, it can hardly be argued that the evidence destruction and alteration by the Defendants was an inevitable result of worker safety or accident investigation. Worker safety could have been best addressed by isolating the hazardous accident site from employees and Defendants' investigation easily conducted in accord with UOSH requirements. But, instead as alleged in Plaintiffs' complaint, Defendants engaged in evidence destruction and alteration to improperly prevent or hinder Plaintiffs' potential legal cause of action. Compl. ¶¶ 53-54 (R. 12).

Liberty Mutual also asserts that Plaintiffs have not been able to demonstrate the third prong of intentional interference, damages. Liberty Mutual Br. 28. Plaintiffs, as previously argued in Section C above, have been damaged.

F. INTERFERENCE WITH CAUSE OF ACTION CONSTITUTES SPOLIATION

Liberty Mutual contends that "interference with a legal process" is not a recognized action, citing *Wilson v. Colonial Penn Life Ins.*, 454 F.Supp. 1208. Liberty Mutual Br. 33. It can be assumed Liberty Mutual does so to refute Plaintiffs' original pleading of tortious interference with a legal cause of action. Compl. ¶ 69(j-k) (R. 21-22). This issue, though, is a matter of semantics. As noted in *Guillory v. Dillard's Dept. Store, Inc.*, 777 So.2d 1 (App. LA,2000), "[i]n some cases, when a plaintiff claims that the ability to institute or prove a civil claim has been impaired due to the negligent or intentional spoliation of evidence by another, courts have addressed the causes of action for impairment of a civil claim and spoliation of evidence as one. Thus, we believe that it is of little importance here, to determine an exact title to label plaintiff's claim." *Id.* at 4.

Liberty Mutual also references the Idaho Supreme Court in *Yoakum v. Hartford Fire Ins. Co.*, 923 P.2d 416 (1996) to indicate that "unreasonable interference" is necessary to demonstrate interference with a prospective

civil action – and presumably that Plaintiffs have not established such. Liberty Mutual Br. 34-35. In *Yoakum*, though, the defendant insurer had merely hired an accident investigator whose original evaluation of a golf cart involved in an accident found the cart defective. During this investigator's second evaluation of the cart – while in the employ of the defendant insurer – he found no defect in the cart. The court reasoned the insurer's retention of the expert was merely meant to "minimize [the insured's] liability, and therefore its own exposure to substantial damages therefrom, by hiring [the expert] to reinvestigate the vehicle and the accident. That is clearly not an improper motive." *Id.* at 424. In the instant case, Defendants' Liberty Mutual and UPS's acts did not constitute mere reinvestigation of the accident scene. Right after the accident as well as after an initial visit by UOSH's Compliance Officer defendants altered, removed, or destroyed evidence of the cause of the electrocution. These deliberate acts, given Plaintiffs' likely wrongful death lawsuit, constitute unreasonable interference – or "tortious interference" as pled by Plaintiffs.

G. PUNITIVE DAMAGES APPLY IF SPOLIATION IS RECOGNIZED

UPS cites due process considerations to refute the application of punitive damages as a deterrent against spoliation. UPS Br. 34-35. Yet, the first case UPS relies upon, *State Farm Mut. Auto Ins. Co. v. Campbell*, 538

U.S. 408 (2003), is a US Supreme Court decision that adjudicates whether the excessive size of a punitive damage claim satisfies due process criteria[5] – not if the imposition of punitive damages in a previously unrecognized tort violates due process.

UPS also relies upon *Landgraf v. USI Film Prods.,* 511 U.S. 244 (1994) to assert violation of due process. The *Landgraf* opinion proves a poor analogy. The *Landgraf* court, after a lengthy analysis of what should be considered if a statute retroactively applies punitive damages, held this question inapplicable as the statute at issue did not explicitly apply retroactive punitive damages. More importantly, although *Landgraf's* dicta indicates there is a presumption against statutory retroactivity, it is not a per se violation of due process to apply duties or damages retroactively. In *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976), the US Supreme Court reasoned, "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. This is true even though the effect of the legislation is to impose a new duty or liability based on past acts," *supra* at 17 (internal citations omitted).

In *Usery*, unlike *Landgraf* which UPS relies upon, the law in question explicitly imposed retrospective liability. Therefore, the US Supreme Court took a further two step analysis to decide if due process was violated. First, the possibility

[5] Held that $145 million in punitive damages award on $1 million compensatory judgment violated due process.

that the tortfeasor did not know harm would be caused by his actions must be considered. Second, it must be asked, even if the tortfeasor knew harm was eminent did he behave in reliance upon the current state of the law? *Id.* In the case *sub judice*, it is implicit that UPS and Liberty Mutual would know destruction or alteration of an accident scene would affect potential causation evidence in a third-party lawsuit – thereby harming plaintiffs. And, most certainly, UPS and Liberty Mutual did not rely upon any law allowing them to destroy or alter accident scene evidence. To the contrary, Defendants violated Utah Admin. Code, R614-1-5.C.2.

Meanwhile, Liberty Mutual argues punitive damages are inapplicable as Plaintiffs' have not effectively pled intentional acts or proved an underlying viable cause of action. These issues, as previously argued above and in Plaintiffs' Brief, remain to be decided by this Court.

II. CONCLUSION

The district court erred when it granted Defendant UPS's Motion to Dismiss, with prejudice, as Plaintiffs' allegations were sufficiently pled to constitute spoliation – a cause of action that should be recognized in Utah; Plaintiffs' allegations were sufficiently pled to invoke the dual capacity doctrine; and Plaintiffs' allegations were sufficiently pled to fall within the "intentional act" exception to Utah's Workers Compensation Act. Moreover, Liberty Mutual should have not been dismissed with

prejudice, as none of the Workers' Compensation Act exclusivity provisions apply to Liberty Mutual, given Liberty Mutual did not employ decedent Mark Hills.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May 2009, pursuant to Utah.R.App.P. 26(b), I caused two true and correct copies of the foregoing document, along with a CD containing a searchable pdf of the document, to be served on each separately represented party or Appellee, by depositing copies in the United States mail, proper first class postage affixed, and addressed to the following:

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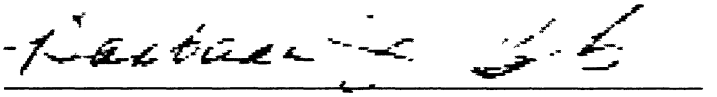
Further, I provided to the Clerk of the Utah Supreme Court, via hand delivery, an original and 9 copies of the foregoing brief along with a CD containing a searchable pdf version of the document.



An Employee of Moriarity, Badaruddin & Booke